

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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4	RANDY FORTIER,)	
5)	No. CV-09-3056-CI
6	Plaintiff,)	
7	v.)	ORDER GRANTING PLAINTIFF'S
8	MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
9	Commissioner of Social)	AND REMANDING FOR ADDITIONAL
10	Security,)	PROCEEDINGS PURSUANT TO 42
)	U.S.C. § 405(g)
	Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 19.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Michael S. Howard represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the case to the Commissioner for additional proceedings.

On June 29, 2005, Randy Fortier (Plaintiff) applied for disability insurance benefits (DIB), alleging disability due to left elbow and right knee impairments. (Tr. 78, 85.) Plaintiff's date of last insured for DIB purposes was June 30, 2006. (Tr. 85.) At the administrative hearing, he alleged a closed period of disability from October 9, 2001, to June 2006, when he returned to work. He also alleged disabling depression during the closed period. (Tr. 583-84.)

Following a denial of benefits at the initial stage and on

1 reconsideration, a hearing was held before Administrative Law Judge
2 (ALJ) James Burke on April 23, 2008. (Tr. 582-95.) Plaintiff, who
3 was represented by counsel, and vocational expert K. Diane Kramer,
4 appeared and testified. (*Id.*) On July 14, 2008, ALJ Burke denied
5 benefits in a written decision. (Tr. 12-18.) The Appeals Council
6 denied Plaintiff's request for review. (Tr. 3-5.) This appeal
7 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
8 405(g).

9 STANDARD OF REVIEW

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
11 court set out the standard of review:

12 The decision of the Commissioner may be reversed only
13 if it is not supported by substantial evidence or if it is
14 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
15 1097 (9th Cir. 1999). Substantial evidence is defined as
16 being more than a mere scintilla, but less than a
17 preponderance. *Id.* at 1098. Put another way, substantial
18 evidence is such relevant evidence as a reasonable mind
19 might accept as adequate to support a conclusion.
20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
21 evidence is susceptible to more than one rational
22 interpretation, the court may not substitute its judgment
23 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
24 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
25 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
27 resolving conflicts in medical testimony, and resolving
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Browner v. Secretary*
5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
6 there is substantial evidence to support the administrative
7 findings, or if there is conflicting evidence that will support a
8 finding of either disability or non-disability, the finding of the
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
10 1230 (9th Cir. 1987).

11 SEQUENTIAL PROCESS

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are
15 "under a disability" are eligible to receive benefits. 42
16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
17 medically determinable physical or mental impairment"
18 which prevents one from engaging "in any substantial
19 gainful activity" and is expected to result in death or
20 last "for a continuous period of not less than 12 months."
21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
22 from "anatomical, physiological, or psychological
23 abnormalities which are demonstrable by medically
24 acceptable clinical and laboratory diagnostic techniques."
25 42 U.S.C. § 423(d)(3). The Act also provides that a
26 claimant will be eligible for benefits only if his
27 impairments "are of such severity that he is not only
28 unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

25 The Commissioner has established a five-step sequential
26 evaluation process for determining whether a person is disabled. 20
27 C.F.R. §§ 404.1520(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42

(1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

STATEMENT OF FACTS

The facts of the case are set forth in detail in the transcript of proceedings, and are summarized briefly here. At the time of the hearing, Plaintiff testified he had returned to work and had been sober since January 26, 2006. (Tr. 585.) The record shows Plaintiff was 51 years old at the time of the hearing, unmarried and had no children. He lived with his mother until she passed away. (Tr. 248-49.) He has a high-school education and additional training as a telecommunications technician. (Tr. 83.) In addition, he has work experience as a security guard, cable installer, electronics repairer, driver, and laborer. (Tr. 88, 97, 592.) Plaintiff's contends his physical impairments combined with depression rendered him unable to sustain work during the closed period. (Tr. 588-89.)

ADMINISTRATIVE DECISION

The ALJ found Plaintiff had not engaged in substantial gainful activity between his alleged onset date and 2005. (Tr. 14.) At

1 step two, he found Plaintiff had the medically determinable
2 impairments of "chronic tendonitis/bursitis of the elbow and knee,
3 uncontrolled hypertension, and intermittent flares of gout." (*Id.*)
4 He made no findings regarding non-severe impairments. At step
5 three, the ALJ found Plaintiff's impairments alone and in
6 combination did not meet or medically equal a listed impairment in
7 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listings). (Tr. 15.) At
8 step four, he found Plaintiff had the residual functional capacity
9 (RFC) to perform light level work, *i.e.* "he can lift carry up to 20
10 pounds occasionally, 10 pounds frequently; and he can sit and stand
11 up to six hours, and walk two hours in an 8-hour workday." (Tr. 15-
12 16.) The ALJ found Plaintiff's statements regarding his symptoms
13 were not credible to the extent they were inconsistent with the
14 ALJ's RFC findings. (Tr. 17.) After finding Plaintiff could no
15 longer perform his past work, ALJ Burke proceeded to step five,
16 applied the Medical-Vocational Guidelines (Grids) and found
17 Plaintiff "not disabled," as defined by the Social Security Act.
18 (Tr. 17-18.)

19 ISSUES

20 The question presented is whether there is substantial evidence
21 to support the ALJ's decision denying benefits and, if so, whether
22 that decision is based on proper legal standards. Plaintiff
23 contends the ALJ erred when he: (1) failed to find Plaintiff's
24 diagnosed depression was a severe impairment at step two; (2)
25 improperly rejected medical opinions of Plaintiff's treating and
26 examining medical sources; and (3) failed to meet his burden at step
27 five when he relied on the Grids. (Ct. Rec. 18 at 11.) Defendant
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1 responds the ALJ's decision is supported by substantial evidence and
2 free of legal error. (Ct. Rec 20.)

3 DISCUSSION

4 A. Credibility

5 On *de novo* review, the court must determine whether the ALJ's
6 determinations are free of legal error and supported by substantial
7 evidence. *Browner*, 839 F.2d at 433. Although issues of credibility
8 are the sole province of the ALJ in these proceedings, when the
9 adjudicator finds a claimant's statements regarding the severity of
10 impairments and limitations are not credible, he must make a
11 credibility determination with findings sufficiently specific to
12 permit the court to conclude the ALJ did not arbitrarily discredit
13 claimant's allegations. *Richardson*, 402 U.S. at 400; *Thomas v.*
14 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *Bunnell v. Sullivan*,
15 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc); *Fair v. Bowen*, 885
16 F.2d 597, 604 (9th Cir. 1989).

17 To reject a claimant's subjective complaints, the ALJ must
18 provide "specific, cogent reasons for the disbelief." *Morgan*, 169
19 F.3d, at 599 (quoting *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
20 Cir. 1990)). If there is no affirmative evidence of malingering, the
21 reasons must be "clear and convincing." *Lester v. Chater*, 81 F.3d
22 821, 834 (9th Cir. 1995). Furthermore, "the ALJ must specifically
23 identify the testimony she or he finds not to be credible and must
24 explain what evidence undermines the testimony." *Holohan v.*
25 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)(citation omitted).

26 If the credibility determination is a critical factor in the
27 ALJ's decision, it should be as comprehensive and analytical as
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1 feasible, and the finding should be explicit whether the Secretary
2 believed or disbelieved the claimant. *Lewin v. Schweiker*, 654 F.2d
3 631, 635 (9th Cir. 1981) (quoting *Baerga v. Richardson*, 500 F.2d 309
4 (3d Cir. 1974), cert denied, 420 U.S. 931(1975). The court will
5 not infer lack of credibility. *Murray v. Heckler* 722 F.2d 499, 502
6 (1983).

7 Here, the ALJ's credibility determination is not sufficiently
8 specific or "clear and convincing." For example, in discounting
9 Plaintiff's statements, the ALJ noted Plaintiff "conceded at his
10 hearing that his elbow and knee impairments were not disabling by
11 themselves or in combination." (Tr. 16.) However, independent
12 review shows that Plaintiff's representative made this assertion at
13 the hearing, not Plaintiff. (Tr. 589.) The representative's
14 statement, unsupported by either Plaintiff's testimony or medical
15 evidence, is not substantial evidence to support the ALJ's finding
16 that Plaintiff's subjective statements are unreliable. In addition,
17 it appears Plaintiff did not describe his mental or physical
18 limitations at the hearing because the ALJ did not question
19 Plaintiff directly about his physical or mental symptoms or how they
20 affected his ability to work between 2001 and 2005. Therefore, the
21 court is unable to review what specific testimony or allegations are
22 being rejected by the ALJ.

23 As found by the Ninth Circuit, although it is Plaintiff's
24 burden to provide evidence of impairments, the ALJ is not "a mere
25 umpire" during disability proceedings. He has a duty to question
26 Plaintiff about symptoms and limitations stemming from the medically
27 determinable impairments established by the record. See *Widmark v.*

1 *Barnhart*, 454 F.3d 1063, 1068-69 (9th Cir. 2006). This is true even
2 if the claimant is represented by counsel. *Brown v. Heckler*, 713
3 F.2d 441, 443 (9th Cir. 1983).

4 The ALJ also reasons that Plaintiff's failure to mention his
5 relapse of substance abuse between February 2005 and May 2005,
6 during a November 2005 psychological evaluation is cause to
7 discredit his claims. (Tr. 16-17; see also Tr. 179, 190-91, 251.)
8 Although a claimant's lack of candor about substance abuse is a
9 "clear and convincing" reason to discount his symptom allegations,
10 *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999), in this case,
11 the ALJ failed to explain what testimony was rendered unreliable by
12 Plaintiff's failure to disclose a recent relapse during the
13 interview, and in what way that failure discredited his claim. On
14 review, the court is unable to determine what testimony the ALJ is
15 disregarding and whether the ALJ's reasoning is supported by
16 substantial evidence. Without more specificity, the ALJ's reasoning
17 is legally insufficient. *Holohan*, 246 F.3d at 1208.

18 Finally, the ALJ's finding that Plaintiff resumed work after
19 four years does not undermine Plaintiff's claim his physical
20 impairments, combined with depression, rendered him unable to
21 sustain work during the closed period alleged. (Tr. 16.) The ALJ's
22 credibility findings are not supported by clear and convincing
23 reasons, which is cause for remand. *Id.*

24 **B. Step Two: Evidence of Severe Mental Impairment**

25 Plaintiff argues the ALJ erroneously ignored evidence of severe
26 mental impairments diagnosed by examining psychologists Drs.
27 Billings and Shultz, and non-examining agency psychologist, Dr. Mary
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1 Gentile, all of whom diagnosed a major depressive disorder. (Ct.
2 Rec. 18 at 15-17; Tr. 204, 235, 252.)

3 At step two of the sequential evaluation, the ALJ determines
4 whether a claimant suffers from a "severe" impairment, *i.e.*, one
5 that significantly limits his physical or mental ability to do basic
6 work activities. 20 C.F.R. § 404.1520(c). To satisfy step two's
7 requirement of a severe impairment, the claimant must prove the
8 existence of a physical or mental impairment by providing medical
9 evidence consisting of signs, symptoms, and laboratory findings; the
10 claimant's own statement of symptoms alone will not suffice. 20
11 C.F.R. § 404.1508. The fact that a medically determinable condition
12 exists does not automatically mean the symptoms are "severe," or
13 "disabling" as defined by the Social Security regulations. *See*,
14 *e.g.*, *Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v.*
15 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

16 However, even if a claimant's depression is determined non-
17 severe, diagnosed mental disorders must be considered in combination
18 with other impairments at step two to determine if the combined
19 impairments have more than a minimal effect on the claimant's
20 ability to perform work activities. 20 C.F.R. § 404.1529. If so,
21 resultant limitations must be considered throughout the sequential
22 evaluation process. *Id.*

23 The adjudicator's role at step two is further explained by SSR
24 85-28:

25 A determination that an impairment(s) is not severe
26 requires a careful evaluation of the medical findings
27 which describe the impairment(s) and an informed judgment
28 about its (their) limiting effects on the individual's
physical and mental ability(ies) to perform basic work

1 activities; thus, an assessment of function is inherent in
2 the medical evaluation process itself. At the second step
3 of sequential evaluation, then, medical evidence alone is
evaluated in order to assess the effects of the
impairment(s) on ability to do basic work activities.

4 SSR 85-28. The regulations advise the adjudicator that "[g]reat
5 care should be exercised in applying the not severe impairment
6 concept." *Id.*

7 In determining whether a claimant has a severe impairment the
8 ALJ must evaluate medical evidence submitted and explain the weight
9 given to the opinions of accepted medical sources in the record.
10 The regulations distinguish among three types of accepted medical
11 sources: (1) sources who have treated the claimant; (2) sources who
12 have examined the claimant; and (3) sources who have neither
13 examined nor treated the claimant, but express their opinions based
14 upon a review of the claimant's medical records. 20 C.F.R. §
15 404.1527. A treating physician's opinion carries more weight than
16 an examining physician's, and an examining physician's opinion
17 carries more weight than a non-examining reviewing or consulting
18 physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th
19 Cir. 2004); *Lester*, 81 F.3d at 830. The Commissioner must provide
20 "clear and convincing" reasons for rejecting uncontradicted
21 examining physician opinions. *Lester*, 81 F.3d at 830.

22 Here, the ALJ failed to discuss or properly reject with "clear
23 and convincing" reasons opinions of examining psychologist Dr.
24 Schultz rendered in her December 2004 evaluation. Dr. Schultz
25 opined Plaintiff had moderate limitations in cognitive and social
26 functioning and marked limitations in his ability to tolerate the
27 pressure and expectations of a normal work setting. She also

1 recommended treatment with medication. (Tr. 199-200.) At the
2 hearing, VE Kramer testified that, if credited, these limitations
3 would significantly affect Plaintiff's ability to work. (Tr. 594-
4 95.)

5 Although the ALJ appears to disregard Dr. Schultz's 2004
6 evaluation because she estimated a duration of six to nine months
7 (Tr. 15), the record shows Dr. Gentile noted several moderate
8 functional limitations due to depression in December 2005. (Tr.
9 228-30, 244.) State agency physicians such as Dr. Gentile are
10 treated as expert non-examining sources in disability proceedings.
11 The ALJ may not ignore these opinions and must explain the weight
12 given. SSR 96-6p. Here, the ALJ failed to discuss or reject Dr.
13 Gentile's opinion that Plaintiff would have moderate limitations in
14 sustained concentration and persistence that would slow his pace.
15 (Tr. 244.) This is reversible error. The limitations assessed by
16 Dr. Gentile and Dr. Shultz are consistent with Plaintiff's claim
17 that he could not sustain work due to depression and physical
18 problems. Because the unrejected medical evidence presented by
19 Plaintiff consists of formal diagnoses of depressive disorder and
20 treatment recommendations, as well as medical opinions that
21 Plaintiff's social functioning was more than minimally impaired, the
22 ALJ erred in failing to find depression was a severe impairment.
23 *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

24 For step two purposes, the Plaintiff met his burden of
25 providing objective medical evidence, as well as medical records
26 documenting ongoing treatment with medication during the alleged
27 closed period. 20 C.F.R. § 404.1526; *Webb*, 433 F.3d at 687.

1 Because the ALJ failed to properly discredit Plaintiff's report that
2 he became depressed in 2001 after his injury, that evidence is
3 credited. (Tr. 250.) As discussed above, unrejected medical
4 evidence establishes more than a "slight abnormality" in Plaintiff's
5 mental condition. Remand is necessary for a new sequential
6 evaluation which will include the effects of all severe and non-
7 severe impairments on Plaintiff's ability to work during the closed
8 period. Further, because of the step two error and the exclusion of
9 unrejected non-exertional limitations assessed by Drs. Gentile and
10 Schultz at steps four and five, the ALJ's application of the Grids
11 at step five was erroneous.¹ *Tackett*, 180 F.3d at 1103.

12 **C. Remedy**

13 A step two determination that a non-exertional impairment is
14 severe "only raises a prima facie case of a disability." *Hoopai v.*
15 *Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007) (*citing Tackett*, 180 F.3d
16 at 1100). Therefore, Plaintiff might not succeed in proving he is

18 ¹ The use of the Grids is appropriate where the claimant's
19 functional limitations "fall into a standardized pattern 'accurately
20 and completely' described by the Grids." *Tackett*, 180 F.3d at 1103
21 (*quoting Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)).
22 Significant non-exertional impairments make reliance on the Grids
23 inappropriate. *Desrosiers v. Secretary of Health and Human Serv.*,
24 846 F.2d 573, 577(9th Cir. 1988). A vocational expert is required
25 where "a claimant's non-exertional limitations are in themselves
26 enough to limit his range of work." *Polny v. Bowen*, 864 F.2d 661,
27 663-64 (9th Cir. 1988).

1 disabled, as defined by the Social Security Act. Even if improperly
2 rejected medical evidence is credited, on the record before the
3 court it is not conclusive that a reasonable ALJ, considering
4 existing medical evidence of physical and psychological impairments
5 in combination (as required by the Regulations), would find
6 Plaintiff disabled. Therefore, remand for additional proceedings is
7 appropriate. See *Stout v. Commissioner, Social Sec. Admin.*, 454
8 F.3d 1050, 1056 (9th Cir. 2006); see also *Salvador v. Sullivan*, 917
9 F.2d 13, 15 (9th Cir. 1990).

10 On remand, the ALJ will take additional testimony from
11 Plaintiff and address medical opinions as discussed above. In
12 addition, the ALJ will address opinions from treating physician Judy
13 Page, D.O. that there were a "limited number of jobs [Plaintiff] can
14 do"; that Plaintiff should avoid repetitive climbing of ladders and
15 stairs; and that Plaintiff cannot do jobs that required strong
16 grasping or repetitive elbow work. (Tr. 275, 308, 465.) A new RFC
17 determination will be made based on properly evaluated medical
18 evidence and credible testimony. A vocational expert, if necessary,
19 will be consulted at steps four and five to opine on the effects of
20 non-exertional limitations on Plaintiff's occupational base.
21 Accordingly,

22 **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
24 **GRANTED** and the matter is remanded to the Commissioner for
25 additional proceedings pursuant to 42 U.S.C. § 405(g) and as
26 directed above.

27 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
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1 **Rec. 19)** is **DENIED**.

2 3. Application for attorney fees may be made by separate
3 motion.

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. The file
6 shall be **CLOSED** and judgment entered for **PLAINTIFF**.

7 DATED August 26, 2010.

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9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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